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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

SAMUEL KAUFMAN,
Counsel for Appellee.

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GROUNDS MAKING AGAINST THE JURISDICTION AND MOTION TO DISMISS APPEAL.

The appellee respectfully presents the following matters and grounds making against the jurisdiction of this Court asserted by the appellant to review the above entitled cause on appeal:

I.

Nature of the Case.

The appellant relies exclusively upon Section 237 (*a*), Judicial Code, the provisions of which are set out verbatim in appellant's Statement of Jurisdiction;

contending that in this cause there "is drawn in question the validity" of a statute of the State of New York, which statute is also set out at length in appellant's Statement of Jurisdiction.

This appellant, upon his appeal to the New Jersey Court of Errors and Appeals, assigned twelve grounds of appeal, to wit:

"1. The Trial Judge erred in admitting in evidence over the objection of counsel for the defendant, Exhibit P-4, which is a part of Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, entitled, 'An Act relating to motor vehicles, motorcycles and highway traffic constituting Chapter 71 of Consolidated Laws,' the part of said Section so introduced reading as follows:

> " 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner.'

"to which admission in evidence exception was duly noted by defendant's counsel.

"2. The Trial Judge erred in denying defendant's motion for a non-suit, to which denial of motion exception was duly entered by defendant's counsel.

"3. The trial court erred in denying defendant's motion for a non-suit, whereas the same should have been

granted on the ground that it appears in the cause that Mr. Balbino was merely a bailee, and not an agent of Mr. Young, to which denial of motion exception was duly entered by defendant's counsel.

"4. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor of the defendant, to which denial of motion exception was duly entered by defendant's counsel.

"5. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor of the defendant which should have been granted upon one or more of the following grounds:

"First, that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

"Second, on the ground that it appears that the statute of New York, which has been offered in evidence in this case, is a penal act, and the rule of law is that the penal law will not be enforced in another State.

"Third, upon the ground that it appears that the claim of the plaintiff rests solely upon a statute of New York, which is in derogation of the common law, is not such as to be similar to any statute in this State, and which is in effect contrary to the rulings of our Court.

"Fourth, because it appears on its face that by a proper interpretation of the New York statute, Section 59 and the other sections which have been put in evi-

dence of the same statute, that the statute is not intended to concern bailments made in New Jersey and the relations and obligations of the bailor located in New Jersey.

"Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law in New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

"Sixth, upon the ground that it appears in this case that the plaintiff was guilty of contributory negligence and that he did not exercise reasonable observation, reasonable judgment, as to how and when to cross the street, in view of the approach of an automobile which he had seen approaching; to which denial of motion exception was duly entered by defendant's counsel.

"6. The Trial Judge erred in charging the jury as follows:

> " 'Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant—is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the accident and injuries, because this statute which was read to you creates a liability against

> the owner or bailor. And relying upon that New York law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59.'

"to which portion of the Court's charge exception was duly entered by defendant's counsel.

"7. The Trial Judge erred in charging the jury as follows:

> " 'As I understand it, it is not disputed, under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability.'

"to which portion of the Court's charge exception was duly entered by defendant's counsel.

"8. The Trial Judge erred in charging the jury as follows:

> " 'Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides 'Every owner of a motor vehicle or motor-cycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motor-cycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"to which portion of the charge of the Court exception was duly entered by defendant's counsel.

"9. The Trial Judge erred in charging the jury as follows:

> "'So I charge you that it is immaterial whether or nor the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied.'

"to which portion of the charge of the Court exception was duly entered by defendant's counsel.

"10. The verdict is contrary to law.

"11. The evidence submitted in this cause does not show any legal liability on the part of the defendant, Charles Young, for the negligence of Michael Balbino.

"12. The judgment in favor of Anthony Masci and against the defendant Charles Young, which has been entered in this cause, deprives the defendant Charles Young of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and deprives him of his liberty to contract and to make contracts in violation of the said Fourteenth Amendment, and denies him equal protection of the law in violation of said Fourteenth Amendment."

From a reading of these grounds of appeal, it appears that the validity of the said statute of the State of New York was not questioned by the appellant and that the New Jersey Court of Errors and Appeals

was never called upon to determine whether the said statute was valid or invalid.

The only Federal question presented to the New Jersey Court of Errors and Appeals was whether, assuming the said statute to be valid, the Supreme Court of New Jersey had deprived the appellant of due process of law in that it had held him subject in the instant case to the operation of the said statute.

It is therefore apparent that the propriety of the ruling below is not reviewable by appeal, but that the proper method of review is by writ of certiorari.

II.

Cases Believed to Make Against Jurisdiction.

The following decisions of this Court are believed to make against jurisdiction of this cause on appeal:

Michigan Cent. R. Co. v. *Michigan Southern R. Co.* (1856), 19 How. 378, 15 L. Ed. 689;

Murdock v. *Memphis* (1874), 20 Wall. 590, 22 L. Ed. 429;

Miller v. *Cornwall R. Co.* (1897), 168 U. S. 131, 18 S. Ct. 34, 42 L. Ed. 409.

It is respectfully submitted that this Court has jurisdiction of this cause only by writ of certiorari and not on appeal.

III.

Motion to Dismiss Appeal.

Counsel for the appellee moves to dismiss the appeal in the cause above entitled on the ground that the

only authorized method for review in this Court of the decision of the New Jersey Court of Errors and Appeals in this cause is by writ of certiorari.

Respectfully submitted,

SAMUEL KAUFMAN,
Counsel for Appellee.

(2937)